Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

KOHLER CO., *Petitioner*

v.

LOCAL 833, UAW-AFL-CIO INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

and

NATIONAL LABOR RELATIONS BOARD, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Kohler Co., prays that a writ of certiorari issue to review an order of the United States Court of Appeals for the District of Columbia Circuit in the above-entitled case. That order denied the motion of petitioner to transfer the case to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

No opinion was rendered by the Court of Appeals. The Decision and Order of the National Labor Relations Board, which are the subject of these review proceedings, are reported in 128 NLRB No. 122.

JURISDICTION

The order of the Court of Appeals was entered on November 23, 1960 (Appendix A, p. 1a). A petition for rehearing, *en banc*, was denied on January 9, 1961 (Appendix A, p. [illegible]). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether 28 U.S.C. § 2112 (a) and 29 U.S.C. § 160 (f) can be so construed as to permit, in proceedings for the review and enforcement of a National Labor Relations Board order, the denial of a motion by the Company against whom the order runs to transfer the cause to the circuit wherein all of the parties reside, the alleged unfair labor practices occurred, related causes have been litigated and the Company has filed a petition for review of the order.

STATUTES INVOLVED

29 U.S.C. § 160 (e):

> The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or re-

straining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to

review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

29 U.S.C. § 160 (f):

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

28 U.S.C. § 2112 (a):

The several courts of appeals shall have power to adopt, with the approval of the Judicial Con-

ference of the United States, rules, which so far as practicable shall be uniform in all such courts prescribing the time and manner of filing and the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers, to the extent that the applicable statute does not specifically prescribe such time or manner of filing or contents of the record. Such rules may authorize the agency, board, commission, or officer to file in the court a certified list of the materials comprising the record and retain and hold for the court all such materials and transmit the same or any part thereof to the court, when and as required by it, at any time prior to the final determination of the proceeding, and such filing of such certified list of the materials comprising the record and such subsequent transmittal of any such materials when and as required shall be deemed full compliance with any provision of law requiring the filing of the record in the court. The record in such proceedings shall be certified and filed in or held for and transmitted to the court of appeals by the agency, board, commission, or officer concerned within the time and in the manner prescribed by such rules. If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency, board, commission, or officer concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals.

STATEMENT OF THE CASE

At 10:30 a.m., EDT, August 26, 1960, the National Labor Relations Board issued its final order in Case No. 13-CA-1780, *Kohler Co. and Local 833, UAW-AFL-CIO, et al.* Five minutes later, at 10:35 a.m., EDT, on August 26, 1960, a petition to review the Board's order was filed in the United States Court of Appeals for the District of Columbia Circuit by Local 833, UAW-AFL-CIO, which had been the Charging Party in the proceedings before the NLRB. (App. A p. 2a) Somewhat later on the same day Kohler Co., the Respondent before the Board, filed in the Court of Appeals for the Seventh Circuit a petition to review the Board's order. (App. B, p. 11a).

On October 12, 1960 the NLRB filed in the District of Columbia Circuit the certified record of the proceedings before the Board and a petition to enforce its order against the Company. The Board stated in its petition for enforcement that it read 28 U.S.C. § 2112 (a) to require it to file these documents in the District of Columbia Court rather than in the Seventh Circuit. (App. A, pp. 5a, 8a)

The petition of the Union for review and the petition of the Board for enforcement were thereafter consolidated (App. A, p. 10a). Kohler Co. then moved to transfer the consolidated proceeding to the Seventh Circuit. The Union opposed the motion. The Board took no position but advised the Court, in substance, that it would have filed its petition for enforcement in the Seventh Circuit except for the pendency of the Union's petition in the District of Columbia Court. On November 23, 1960 the Court of Appeals denied the motion to transfer. The Company moved promptly

for reconsideration *en banc* and that motion was denied on January 9, 1961. (App. A, p. 10a).

In the meantime the NLRB had filed a motion in the Seventh Circuit seeking to transfer the Company's petition for review from that Court to the D. C. Circuit. The Board took the position in its motion that the Seventh Circuit was required by 28 U.S.C. § 2112 (a) to transfer the case to the D. C. Circuit so that the latter Court could make the preliminary determination envisioned by 28 U.S.C. § 2112 (a). On January 18, 1961, over the objection of the Company and after denial by the D. C. Circuit of the petition for rehearing *en banc* of the motion to transfer, the Seventh Circuit granted the Board's motion and transferred the Company's petition for review to the District of Columbia Circuit. (App. B, p. 16a).

As noted previously, the Company was the sole respondent in the proceedings before the Board. The Union was the Charging Party. In consequence, the Board's final order ran only against the Company. It directed the Company to bargain in good faith with the Union, upon application to offer immediate reinstatement to certain striking employees, and to take certain other affirmative action. The Company was also ordered to cease and desist from violating Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended (29 U.S.C. § 158 (a) (1), (3) and (5)). 128 NLRB No. 122

The Board declined to find, however, that the Company had violated the Act in certain of the respects charged,—including the discharge for misconduct during the strike of some 77 former employees.

Thus, the Board's order was in certain respects adverse to the Company and in others adverse to the Union. The Union's petition for review, filed in the District of Columbia Circuit, sought review of those portions of the order adverse to its interests, while the Company's petition to the Seventh Circuit sought review of those portions adverse to its interests. In accordance with the provisions of Sections 10 (f) of the NLRA, as amended (29 U.S.C. § 160 (f)), the sole respondent named in each of the petitions for review was the National Labor Relations Board.

The Board's petition to the D. C. Circuit for enforcement of its order was allegedly filed under Section 10(e) of the NLRA, as amended (29 U.S.C. § 160 (e)). It related only to those portions of the Board's decision and order which ran against the Company and it named the Company alone as respondent. (App. A, p. 5a).

REASONS FOR GRANTING THE WRIT

The order of the District of Columbia Circuit denying transfer to the Seventh Circuit involves an important question in the administration of the review and enforcement provisions of the National Labor Relations Act, as amended, which question has not been, but should be, settled by this Court. In addition, the case presents for decision an issue that has produced an apparent conflict within the District of Columbia Circuit which that Court has failed to resolve.

(a) The Importance of the Question

The *Kohler* case is the third one within the past six months to present to the District of Columbia

Circuit the question of the appropriate Court of Appeals to entertain proceedings to review NLRB orders.[1] The three cases have such marked similarities as to suggest that a specific procedural technique has been developed for dealing with review of NLRB cases. In each instance a union which was the Charging Party in proceedings before the Board has outsped a respondent employer in a race to the courthouse to lodge a 10 (f) petition for review. Thus, the petitioning union succeeds in selecting the District of Columbia Circuit as the Court to make the initial 2112 (a) determination. It is then argued to the District of Columbia Court that the language of Section 10 (f) of the NLRA provides for alternative jurisdiction in that Court to review NLRB orders which is not subject to the *forum non conveniens* considerations that apply to all other Courts of Appeals under 2112 (a).[2] It is believed that this argument has been accepted by the Court of Appeals and that its acceptance underlies the denial of the Kohler Motion to Transfer to the Seventh Circuit.

Because of the Labor Board's practice of releasing decisions from its headquarters and because of the location of those headquarters in the District of Colum-

[1] The three cases are Butcher Boy Refrigerator Door Co., Cases Nos. 15,849 and 15,885; Gulf Bottlers Co., Cases Nos. 15,754 and 15,929; and Kohler Co., Cases Nos. 15,961 and 16,031. In both Gulf Bottlers and Kohler the employer's motion to transfer was denied as was a petition for rehearing *en banc*. Motion to transfer was granted in Butcher Boy. No rehearing was sought.

[2] Significantly, this argument does not appear to have been made by the union in the *Butcher Boy Refrigerator Door* case. This appears to be the only ground on which the allowance of the motion to transfer in that case can be reconciled with the denials in the *Gulf Bottlers* and *Kohler* cases.

bia, a petition for review of an NLRB order can usually be lodged with the D. C. Circuit before a similar document can be filed in any other circuit. Thus, persons desiring to vest the District of Columbia Circuit with 2112 (a) jurisdiction normally have it in their power to do so. For that reason the criteria applied by the D. C. Circuit in making 2112 (a) determinations become of great importance in the administration of the NLRA. By the same token, the development in that Circuit of a rule of law for the application of 2112 (a), which, we submit, is erroneous, presents a question of major importance in the administration of the NLRA that justifies review and correction by this Court.

(b) The Construction of 28 U.S.C. § 2112(a) by the Court of Appeals Is Probably Erroneous

Since the Court of Appeals rendered no opinion, it is necessary to consider each possible ground of decision. They are believed to be two. First, the Court may have concluded that, on balance, the convenience of the parties and the interest of justice dictated that the case should be retained in the District of Columbia. Second, the Court may have considered that transfer should be denied because Congress intended that persons aggrieved by NLRB orders should have a right of review in the District of Columbia Circuit irrespective of the convenience of the parties and the interest of justice.[3] It is submitted that neither ground can sustain the decision.

[3] A third ground of decision was tendered to the Court of Appeals by the Union; it was charged that the Company was "forum shopping" in seeking transfer to its home circuit, the Seventh. We do not treat the argument separately here because we believe it to be frivolous when measured against the facts disclosed by this record.

The only "convenience" suggested to the Court of Appeals as a basis for retaining the case in the District of Columbia arose from the fact that principal appellate counsel for the Union reside and practice here, as do associated counsel for the Company and the Associate General Counsel of the Board who has general supervision over proceedings to enforce NLRB orders. All other relevant contacts with the case lie in the Seventh Circuit; the Union and the Company reside there; the employees involved both work and reside there; the alleged unfair labor practices occurred there; any Company compliance with a Board order or decree must take place, and be supervised,[4] there; principal counsel for the Company resides and practices there; and, counsel who represented the Union before the NLRB reside and practice there. Thus, the balance of the convenience of the parties and the interest of justice seems heavily weighted in favor of transfer to the Seventh Circuit. Indeed, so heavily do the scales preponderate in favor of that result that we do not believe that the decision of the Court of Appeals rests on an appraisal of the *forum non conveniens* factors. If, however, we are wrong in this assumption, then the decision of the Court of Appeals presents a truly grave question in the administration of Section

[4] We do not imply that the Company would resist a court decree. On the contrary, the Company is now voluntarily complying with certain portions of the Board's order. However, the case is an exceptionally multifarious one. The transcript of proceedings before the Board exceeded 20,000 pages, exhibits numbered several hundreds, and scores of issues were presented for decision. In consequence, numerous conferences between Company officials and Board personnel have been necessary in order to resolve problems of interpretation and application of the Board's order. Even so, many issues remain unsettled.

2112 (a) and of the review provisions of the NLRA. In effect, the Court of Appeals has held, on this hypothesis, that the employment of District of Columbia counsel to conduct proceedings to review NLRB orders outweighs, for purposes of forum selection, all other considerations affecting the convenience of the parties and the interest of justice.

We suggest that such an artificial and mechanical test cannot have been in the contemplation of Congress when it enacted 28 U.S.C. § 2112 (a) and that the adoption of such a test by the District of Columbia Circuit justifies review and correction by this Court.

The alternative, and more probable, ground of decision of the Court of Appeals is that Section 10 (f) of the NLRA creates a right of review in the District of Columbia Circuit which is unaffected by the *forum non conveniens* considerations written into 28 U.S.C. § 2112 (a). The basis for the argument in favor of this construction is found in the first sentence of Section 10 (f) which provides in pertinent part:

> Any party aggrieved by a final order of the Board . . . may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia . . . .

The argument made to the District of Columbia Circuit is, in effect, that the specific reference to the "United States Court of Appeals for the District of Columbia" reflects Congressional recognition of the special competence and experience of that Court in

the review of administrative action. Because of that special competence and experience, so the argument runs, Congress has provided that persons aggrieved by Board orders shall have a right to review in the District of Columbia Circuit alternative to their right to proceed in one of the other circuits specified in 10 (f). The Congressional purpose in granting this so-called District of Columbia option would be defeated, it is said, if the jurisdiction of the District of Columbia Court were held to be subject to the *forum non conveniens* provisions of 28 U.S.C. § 2112 (a).[5]

There are two fundamental objections to the argument. First, since the Board deems itself bound by 28 U.S.C. § 2112 (a) to file its record and its 10 (e) petition for enforcement with the 2112 (a) court, the interpretation given to 10 (f) by the District of Columbia Circuit has the practical effect of compelling the Board to bring enforcement proceedings in the District of Columbia Court without regard to the place of residence of the person against whom the Board order runs. Thus, for the exercise of the Board's discretion as to the need, place, and time for the initiation of enforcement proceedings there is substituted the judgment of the Charging Party. That result cannot be reconciled with the decisions of this Court

[5] The argument that the D. C. Circuit has peculiar expertise in NLRA cases is completely lacking in statistical support. Table B3 of the 1960 Annual Report of the Director of the Administrative Office of the United States Courts shows that for the 5-year period 1956-1960 the District of Columbia Circuit ranked seventh among the eleven Courts of Appeals in number of NLRB proceedings reviewed. In none of the 5 years did the D. C. Circuit rank higher than sixth in cases of this type. Percentagewise the District of Columbia Circuit disposed of 6% of the cases arising from NLRB proceedings during the 5-year period.

in *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265 and *Nathanson* v. *NLRB*, 344 U. S. 25, where it was held that the Board has complete and exclusive control over proceedings to enforce its orders. Moreover, the result reached by the Court of Appeals is inconsistent with the long line of decisions in this Court recognizing the broad remedial discretion of the Board.[6]

The second objection to a construction of Section 10 (f) and 28 U.S.C. § 2112 (a) which would recognize an optional right of review in the District of Columbia independent of *forum non conveniens* considerations is that it flies in the face of the legislative history of both Section 10 (f) and 28 U.S.C. § 2112 (a). Every reference to the District of Columbia Court that we have discovered in the legislative history of Section 10 (f) reflects solely a Congressional intent to provide a *convenient*, rather than a peculiarly expert, optional forum for aggrieved litigants.

We find no special reference to the District of Columbia Circuit in the legislative history of 28 U.S.C. § 2112 (a). On the contrary, discussion of the purpose of the Bill is cast, throughout that history, in terms of the courts of appeals generally. We submit that there is no warrant for carving from the operation of the provision an exception for the District of Columbia Circuit in the complete absence of any expression of Congressional intent to create such an exception.

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[6] See, for example, NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953); NLRB v. Gullett Gin Co., 340 U.S. 361, 363 (1951); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941).

(c) The Conflict Within the Circuit

The following table shows the names of the three cases which have presented to the Court of Appeals the question raised by the Kohler Motion to Transfer, the disposition made in each case of the Motion to Transfer and the panel of the Court of Appeals to which the Motion was presented:

Case Name and Number	Disposition of Motion to Transfer	Panel
Gulf Bottlers Co., Cases Nos. 15,754 and 15,929	Denied (App. C, p. 18a)	Chief Judge Prettyman Circuit Judge Edgerton
Butcher Boy Refrigerator Door Co., Cases Nos. 15,849 and 15,885	Granted (App. D, p. 20a)	Circuit Judges Wilbur K. Miller, Fahy, Danaher
Kohler Co., Cases Nos. 15,961 and 16,031	Denied (App. A, p. 1a)	Circuit Judges Prettyman, Fahy, Burger

Since no opinion was rendered in any of the cases, it is impossible to know whether *Butcher Boy* has been overruled, or whether a conflict exists within the Circuit.

The inconsistency in the results reached was pointed out to the Court in motions for reconsideration *en banc* filed by both Gulf Bottlers and Kohler Co. Reconsideration was, nevertheless, denied in both cases.

Under the circumstances it is submitted that the case may be an appropriate one for the employment of the procedure followed in *United States ex rel. Robinson* v. *Johnston*, 316 U. S. 648. There, certiorari was granted, partially because of an intra-circuit

conflict, and the case was remanded to the Court of Appeals for further consideration with express leave to the petitioner to apply to the Court of Appeals for a hearing *en banc*.

CONCLUSION

The order of the Court of Appeals denying the Motion of Kohler Co. to transfer to the Seventh Circuit has disposed finally of an issue which is "fundamental to the further conduct of the case." *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 685. See also, *Hoffman* v. *Blaski*, 363 U. S. 335; *Land* v. *Dollar*, 330 U. S. 731; *United States* v. *General Motors Corp.*, 323 U. S. 373. Moreover, as Judge Frank noted with the concurrence of Judge Learned Hand, in *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329 (2d Cir. 1950), *cert. denied* 340 U. S. 851, denial of a transfer is the sort of interlocutory order which justifies an extraordinary appellate remedy, for

> ". . . should petitioners—the defendants—finally lose on the merits below, any error in the interlocutory order would probably be incorrectible on appeal, for petitioner could hardly show that a different result would have been reached had the suit been transferred . . . ." (182 F. 2d at p. 330)

For the reasons stated, it is respectfully submitted that a writ of certiorari should be granted.

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